Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-199

ELINOR H. KERPELMAN,

Petitioner,

v.

BOARD OF PUBLIC WORKS OF MARYLAND, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION OF RESPONDENT MARYLAND MARINE PROPERTIES, INC.

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OPINION BELOW

Kerpelman v. Board of Public Works, 261 Md. 436, 276 A. 2d 56 (1971).

JURISDICTION

As is set forth in the Argument below, this Honorable Court lacks jurisdiction because the Petition for a Writ of Certiorari was not timely filed and because the decision of the Court of Appeals of Maryland was based solely upon adequate and independent state grounds.

QUESTIONS PRESENTED

I.

Was the Petition for a Writ of Certiorari filed within ninety days of the entry of final judgment by the Court of Appeals of Maryland, the highest court of the State of Maryland?

II.

Was the decision of the Court of Appeals of Maryland based upon adequate and independent state grounds?

STATEMENT OF THE CASE

The Court of Appeals of Maryland, in its opinion and order filed on April 12, 1971 (Pet. 1A-8A), affirmed the order of the Circuit Court for Worcester County, Maryland dated August 31, 1970 (Pet. 21A-22A). The order of the lower court, *inter alia*, sustained without leave to amend the demurrer filed by this Respondent, Maryland Marine Properties, Inc., to the Bill of Complaint of Petitioner.

The Bill of Complaint challenged a transaction entered into in 1968 between Respondent, Board of Public Works of Maryland, and this Respondent, Maryland Marine Properties, Inc. The Bill of Complaint alleged that the Board of Public Works of Maryland, acting in accordance with the authority expressly vested in it by the then applicable provisions of Section 15 of Article 78A of the Annotated Code of Maryland (1965 Repl. Vol.), conveyed the State's interest in 197 acres of marshlands located in Worcester County on the Eastern Shore of Maryland, to Respondent, Maryland Marine Properties, Inc., the owner of the riparian shore line adjacent to the marsh. Such conveyance was alleged to have been made in exchange for the conveyance to the State of Maryland of other marshlands

owned by Respondent, Maryland Marine Properties, Inc. The concern expressed by Petitioner in her Bill of Complaint was that Respondent, Maryland Marine Properties, Inc., intended, in 1968, to fill and otherwise improve the marshlands in question. There is no allegation, however, in the Bill of Complaint that any such activity was or would be in violation of any federal, state or local statute or regulation, or that Respondent failed to obtain all necessary permits required by the various regulatory agencies.

In the Bill of Complaint, Petitioner based her standing to challenge the transaction above solely on her status as a taxpayer and resident of Baltimore City, which is far removed from the property in question, located on the Eastern Shore of Maryland.

ARGUMENT

I.

THE PETITION WAS FILED TOO LATE.

The Maryland Court of Appeals rendered its opinion and final order in this case on April 12, 1971. The Petition for a Writ of Certiorari was not filed in this Court until August 9, 1971, more than ninety days after the entry of the final order of the Court of Appeals of Maryland and without an extension being granted by a Justice of this Court. The decisions of this Court, the Maryland Court of Appeals and the United States District Court for the District of Maryland make it clear that such late filing violates the requirements of 28 U.S.C. §2101 (c) and Rule 22 of this Court and that the Petition, therefore, should be denied.

The test for determining when a judgment of a state court becomes final for the purpose of review by this Court and, therefore, for determining when the ninety-day period begins to run, was set forth in *Market Street*

Ry. v. R.R. Commission, 324 U.S. 548 (1945). Mr. Justice Jackson stated:

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run." (324 U.S. at 551-552.)

Under Maryland practice, it is clear that the issuance and docketing of the opinion and order of the Court of Appeals of Maryland, which in this case took place on April 12, 1971, is the critical date for the application of the rule set forth above. This is the date of decision referenced for this case and for all Maryland Court of Appeals cases by both the Maryland and Atlantic reports.

The Court of Appeals of Maryland has had specific occasion to construe its own rules of appellate procedure in light of the federal ninety-day requirement for certiorari. The Maryland court was squarely faced with the issue of what criminal convictions had become final under the test of *Linkletter v. Walker*, 381 U.S. 618 (1965) at the time the Maryland court handed down its landmark decision in *Schowgurow v. State*, 240 Md. 121, 213 A. 2d 475 (1965) on October 11, 1965. The resolution of this issue involved an express determination of whether in each case the time for the filing of a petition for writ of certiorari in this Court had expired. In *Tucker v. Warden of Maryland Penitentiary*, 243 Md. 331, 220 A. 2d 908 (1966), the Court of Appeals of Maryland expressly held that the prior Tucker conviction became final on July 13, 1965, the date the court issued an order dismissing the appeal. This

is the corresponding date to April 12, 1971 in this case. See also *Terry v. Warden of Maryland Penitentiary*, 243 Md. 610, 221 A. 2d 691 (1966). Similarly, in *Cowans v. Warden, Maryland Penitentiary*, 276 F. Supp. 696, 698 (D. Md., 1967), a *habeas corpus* case, the court held that the Petitioner's conviction became final on the date when the opinion on his direct appeal to the Maryland Court of Appeals was filed.

Ignoring the controlling authorities cited above, Petitioner contends that the date of the issuance of the mandate under Maryland practice is the critical date for the purpose of filing a petition for a writ of certiorari. Under Maryland practice, the issuance of a mandate is a routine ministerial function performed by the clerk of the court. See Rule 876b of the Maryland Rules of Procedure, Vol. 7B of the Annotated Code of Maryland (1963 Repl. Vol.). In the mandate, the clerk merely certifies the previous entry of the final action of the court. The date of the mandate has no significance for the purpose of determining the appropriate time in which to file a petition for certiorari in this Court.

II.

THE DECISION OF THE COURT OF APPEALS OF MARYLAND IN THE INSTANT CASE WAS BASED SOLELY UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

After a careful review of the factual allegations set forth in Petitioner's Bill of Complaint, the Maryland Court of Appeals affirmed the decision of the lower court, concluding that Petitioner had failed to establish her standing to sue. This Court has consistently held that it lacks jurisdiction to review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *Fox Film Corp. v. Muller*, 296

U.S. 207, 209-210 (1935). A state court ruling based upon standing to sue constitutes adequate and independent state grounds. See *Cramp v. Board of Public Instruction*, 368 U.S. 278, 281-282 (1961).

To attack in this Court a decision based upon independent state grounds, Petitioner must clearly show that the ruling of the state court was frivolous and contrary to previous precedents or that the decision places a totally unreasonable obstacle in the way of judicial enforcement of alleged federal rights. Neither situation exists here.

The opinion of the Maryland Court of Appeals (Pet. 1A-8A) adopts a long line of Maryland authorities holding that a litigant has no standing to challenge the constitutionality or application of a statute unless an interest as a taxpayer is adequately alleged or unless the litigant alleges a special interest in the subject matter apart from that of the general public. The court properly found that Petitioner had made no such allegations in the instant case.

The ruling of the Maryland Court of Appeals concerns only the facts as alleged by the individual Petitioner. It is apparent from the court's opinion and from the prior Maryland decisions that other individuals or groups of individuals might well have standing to raise issues touched on by Petitioner and that the Maryland court in such event would decide on the merits a case which was properly presented to it. The Maryland doctrine of standing to sue, however, which is consistent with the general body of law on the subject, was intended to discourage, and rightly so, totally frivolous and ill-conceived litigation of which the instant case is a prime example.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS P. PERKINS, III,
Attorney for Respondent,
Maryland Marine Properties, Inc.

September 1, 1971